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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 875

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 189 F. Supp. 885, and a copy appears in the separate Appendix filed herewith (Op., App. 1-57). By its terms this opinion stands as the court's findings of fact and conclusions of law (Op., App. 57).

JURISDICTION

This suit originated with the filing by the Government of a petition in equity (Complaint, App. 58-85) on February 27, 1920, under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 4. A consent decree (Decree, App. 86-104) was entered the same day by the Supreme Court of the District of Columbia.

The instant modification proceedings were commenced in November and December, 1956, when appellants Swift, Armour and Cudahy filed separate petitions for modification of the decree. All petitions were filed in the United States District Court for the District of Columbia, and the cause was thereafter transferred in its entirety to the District Court for the Northern District of Illinois, Eastern Division, on January 15, 1958, pursuant to the provisions of Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a).

Following a trial, the latter district court entered judgment on December 12, 1960, denying the petitions in their entirety (App. 57A). The notice of appeal was filed in that court on February 8, 1961. The jurisdiction of this Court to review the judgment by direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. The following decisions sustain the jurisdiction of this Court to review the judgment by direct appeal: *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Hughes v. United States*, 342 U.S. 353 (1952); *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2, 4, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor . . . .

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

* * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.

QUESTIONS PRESENTED

A forty-year old antitrust consent decree prohibits appellants from engaging in the otherwise lawful competitive activities of manufacturing, wholesaling or retailing of groceries and certain other products, selling fresh milk and cream, or operating retail meat markets. The district court denied relief from any of these prohibitions. The following questions are presented by this appeal:

1. Whether the district court applied erroneous legal standards for consent decree modification by determining: that such standards are more stringent than those applicable to a litigated decree; that a consent decree is a bargain which should not be modified by the court as long as the defendant retains the original consideration received in the settlement; that appellants in 1920 bargained away their right to engage in the activities prohibited by the decree in supposed consideration for retaining their size as meat packers; that appellants' size is synonymous with the danger of competitive abuse; and that the Supreme Court's decision in *United States v. Swift & Co.*, 286 U.S.

106, deprived the court of discretion to modify the decree as long as appellants continue to be large meat packers.

2. Whether the district court erred as a matter of law in failing to conclude that the dangers to competition against which the aforesaid decree prohibitions were directed were the ability of appellants in 1920 to distribute groceries through their meat distribution systems at substantially no increase in overhead expense and the danger that appellants would use this advantage to engage in predatory price cutting so as to eliminate competition, in light of their then ability to utilize their positions in the meat industry to force their customers to buy groceries from them in order to obtain meats, and whether the district court erroneously denied modification of the consent decree since its findings and the undisputed evidence show that these dangers to competition no longer exist.

3. Whether the district court erred in denying relief from each of the decree provisions which bar appellants from: (a) manufacturing or processing the prohibited commodities, (b) wholesaling or distributing the prohibited commodities, (c) operating retail food stores for the sale of the prohibited commodities and meats, or (d) selling and distributing fresh milk and cream, since the court made no finding that appellants would adversely affect competition by manufacturing the prohibited commodities, and its findings as to wholesaling, the operation of retail food stores and selling fresh milk and cream are inconsistent with denial of relief.

4. Whether the district court erroneously concluded that a showing of hardship to petitioners from the continued existence of the decree was a necessary requirement for its modification, and further erred in failing to find that petitioners have shown hardship stemming from changes in conditions which entitle them to modification.

STATEMENT

This case presents the broad question of the proper test for modification of antitrust consent decrees which prohibit otherwise lawful business activities. The injunctive restraints which the district court has refused to remove have been in force for over forty years. They exclude appellants from extensive areas of the nation's food industry. As continuing prohibitions of otherwise completely lawful competitive business endeavor, the restraints undoubtedly are among the most sweeping ever entered under the Sherman Act. Unlike antitrust decrees restraining only illegal practices, the continuation of consent decrees enjoining otherwise lawful business activity after the original need has been dissipated through changed economic conditions, transforms such decrees from guardians against competitive abuse into hobbles upon free competition. If the objectives of the antitrust laws are not to be perverted, such decrees must be modified whenever it is affirmatively shown that extraordinary restraints are no longer needed to protect the public against the dangers which originally evoked them. The district court ignored these fundamental principles and denied relief in the face of extensive evidence and its own findings demonstrating that those dangers no longer exist.

1. The Origin of the Consent Decree Entered in this Case

This case originated on February 27, 1920, with the filing of a petition in equity (Complaint, App. 58) by the Government under the Sherman Act against the then five leading meat packers, Swift & Company, Armour and Company, Wilson & Company, the Morris Packing Company and The Cudahy Packing Company, together with their subsidiaries and principal executives. The charge was that the defendants had achieved a monopoly in the meat packing

industry through combination and conspiracy, including agreements apportioning livestock purchases among themselves, the acquisition and control of stockyards and stockyard terminal railroads, the purchase of trade papers and journals and other devices aimed at unified control of the meat industry. Having eliminated competition in meat products, the defendants, according to the complaint, were attempting to extend their monopoly into so-called "substitute" foods, *i.e.*, non-meat groceries. The means used by the defendants to achieve this objective were alleged as follows:

> "To accomplish this purpose the defendants availed themselves of the advantages afforded by the refrigerator cars, route cars, auto trucks, branch houses, and storage warehouses owned or controlled by them. These facilities intended primarily for the sale of meats were employed with comparatively no increase of overhead in the distribution of the substitute foods and unrelated commodities. The defendants were enabled thereby to reach remote spots. This advantage was also employed temporarily to fix prices so low as to gradually eliminate competition" (Complaint, App. 78).

Through their 1,120 branch houses, 1,297 railroad route cars, fleets of auto trucks and other facilities, and through their extensive branch house sales forces, defendants were in a unique position to reach retail food stores in thousands of towns throughout the nation (Complaint, App. 72-74, 78). As indicia of the extent to which the monopolistic attempts had been successful, the complaint cited the growth and profits of the defendants and the number of companies they controlled (Complaint, App. 79-80). The Government's complaint prayed for specific injunctive relief aimed at ending the alleged monopoly in meat and the attempted monopoly in other fields. Although the defendants, in their answers denied the material allegations of

the complaint, they consented to the entry of a decree conforming in substantially all respects to the Government's prayer.

The consent decree (Decree, App. 86) enjoined the defendants from combining or conspiring to restrain or to monopolize trade, attempting to monopolize or monopolizing trade or engaging in any illegal trade practice (paragraphs First and Ninth). In addition, defendants were enjoined from holding any interest in public stockyard companies, stockyard terminal railroads or market newspapers (paragraphs Second and Tenth), or in public cold storage warehouses (paragraph Seventh), from engaging in the manufacture, distribution and sale of over 140 categories of grocery and miscellaneous products (paragraphs Third and Fourth), from owning and operating or conducting retail meat markets (paragraph Sixth), and from distributing and selling fresh milk and cream (paragraph Eighth).

2. The Prior Proceedings for Modification of the Consent Decree[1]

In 1929, a proceeding to modify portions of the consent decree was commenced in the Supreme Court of the District of Columbia by Swift, Armour and their respective subsidiaries.[2] That court modified the decree so as to permit

[1] On a motion by an intervenor, California Cooperative Canneries, to vacate the decree, the Supreme Court of the District of Columbia suspended the operation of the decree on May 1, 1925. Thereafter the legal validity of the decree was sustained in Swift & Co. v. United States, 276 U.S. 311 (1928), and the decree was restored to force on July 24, 1929, by the district court on mandate from this Court in United States v. California Cooperative Canneries, 279 U.S. 553 (1929).

[2] Of the five principal defendants named in the original suit, Morris had discontinued its business and sold its assets to Armour in 1923, and Wilson and Cudahy did not join in the 1929 petition

defendants to manufacture and wholesale the prohibited commodities, but in all other respects continued the decree in force as originally entered.

On appeal in *United States v. Swift & Co.*, 286 U.S. 106 (1932), the Supreme Court reversed the order modifying the decree and dismissed the defendants' petitions. The Court was "not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent" (*Id.* at 114). Rather the case turned on "whether enough has been shown to justify its exercise" (*Id.* at 115). Defendants asserted that changed conditions in the food industry since the entry of the decree made continuation of its restraints no longer necessary. To the Court, "the inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow" (*Id.* at 119).

In light of the evidence then before it, this Court concluded that the dangers to competition in the grocery field against which the decree was directed were still substantial. It observed that, "two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint," and that, "whatever persuasiveness the reasons then had," was "theirs with undiminished force" on the record before it (*Id.* at 115). "The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead" (*Ibid*). As in 1920, the existence of this advantage was undisputed, and thus defendants were still able "by their

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to modify the decree, but stated in open court that they would consent to modification, provided it was made applicable to all defendants. . .

own admission to lay a handicap on rivals overweighted at the start" (*Id.* at 118). Similarly, the "second reason stated in the bill of complaint" remained, since defendants' "low overhead," resulting from the use of their existing distributive system for groceries, would still give them the "temptation" to engage in the practice of "fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated" (*Id.* at 116).

The Court also observed that despite the change of conditions then asserted by defendants, retailers were constrained to "look to the defendants for their meats" (*Id.* at 118). Accordingly, defendants were still in a position to exert "unfair pressure upon retailers and others with the design of forcing them to buy from the defendants and not from rival grocers" (*Ibid*).

Thus, the case came down to the defendants' inability to refute the continuing need for the decree as a protection against the dangers to competition which prompted its entry.

In disposing of defendants' alternative argument that modification was in order because of the hardship to which they were being subjected in reduced profits and increased costs due to their inability under the decree to employ their meat distributive system for the prohibited grocery products, the Court observed: "No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression" (*Id.* at 119). This observation with respect to hardship was made only after the Court had found the original reasons which prompted entry of the decree still to exist.

3. The Present Proceedings for Modification of the Consent Decree[3]

In November and December, 1956, Cudahy, Swift and Armour separately filed their current petitions for modification of the decree. During the many years that had elapsed since the *Swift* decision, the appellants had faithfully complied with all provisions of the decree. In contrast to the situation at the time of the 1930 proceedings, appellants had long since divested themselves of all facilities and interests proscribed by the decree.

In their current petitions, Swift, Armour and Cudahy request that they be relieved of the decree restrictions on their engaging in the manufacture, distribution and sale of the more than 140 categories of grocery and miscellaneous products listed in the decree (paragraphs Third and Fourth), operating retail meat markets (paragraph Sixth) and distributing and selling fresh milk and cream (paragraph Eighth).[4] Appellants seek no modification of the important provisions of the decree which bar them from engaging in any illegal restraints of trade or unfair trade practices (paragraphs First and Ninth), and which prohibit their ownership of stockyard facilities, railroads or newspapers, and public cold storage warehouses (paragraphs Second, Seventh and Tenth).

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[3] Citations will be abbreviated as follows:

1930 R.—Transcript of record filed in the Supreme Court in United States v. Swift & Co., 286 U.S. 106.

Tr.—Transcript in the present proceedings.

SX, AX, CX, GX, JX—Swift, Armour, Cudahy, Government and Joint Exhibits respectively in the present proceedings.

[4] No appeal has been taken from the denial of the requests of Cudahy for modification of certain other portions of the decree.

Although the evidence at the trial of appellants' current petitions dealt extensively with the changes which have occurred in the food industry since the entry of the decree in 1920 and the trial of the earlier modification proceedings in 1930, there was little factual dispute at the trial and the district court so stated:

> "The voluminous record and extensive arguments in these proceedings reveal few sharp disputes of fact. In general, the parties are agreed upon the statistical information presented, and upon the observable facts which describe the structure and patterns of the food industry today. The factual portion of the controversy is therefore concentrated upon the conflicting inferences which might be drawn from the admitted facts, the question of the characterization of prevailing market conditions, and the application of the standards, tests, and measures for the modification of an equity decree entered upon the consent of the parties. The conflict is concerned more with the significance of facts than with their existence" (Op., App. 31).

As the following summary statement of the evidence will show, in contrast to 1930, the dangers to competition in the grocery field against which the decree was directed no longer exist. The reasons alleged by the Government in 1920 and found by this Court in 1932 to form the basis for the decree have disappeared, as confirmed by the findings of the district court read in the light of the undisputed evidence as to present-day conditions.

a. **The Evidence of Changed Conditions in Grocery Retailing, Wholesaling and Manufacturing**

Prior to and during the 1920's, appellants' meat distribution systems, including branch houses, railroad route cars and other facilities provided them with a unique distributive system for their meat as well as their grocery

products, which enabled them to reach the tens of thousands of small independent retailers who then predominated. More importantly, appellants could employ their meat distribution systems not only for handling meat, for which they were designed, but also for handling and selling groceries at no substantial increase of overhead. The resulting low overhead afforded them the cost advantages which, the Government's complaint alleged, enabled them to engage in predatory price-cutting (Complaint, App. 78; *Swift* case, *supra*, 286 U.S. at 115).

In contrast to the situation prevailing in both 1920 and 1930, appellants' distributive facilities today, as the district court found, "would not afford any substantial advantage in the distribution of groceries along with meats" (Op., App. 55). The district court found that the "branch houses now in use for meats are not adaptable for the handling of the large quantities of grocery items required by modern retail outlets" (*Ibid.*). They are uneconomic for distributing even those limited types of grocery products not barred by the decree.[5] As a result, as found by the court, the "permitted grocery items sold by the defendants are being distributed to an increasing degree independently of meats, through separate units of the business" (Op., App. 55). The separation referred to by the court is thoroughgoing. Appellants have placed the manufacture, distribution and sale of their respective permitted grocery items under management unconnected with fresh meat operations, in separate departments utilizing sales forces and distributive techniques divorced from the fresh meat operations. As a result, appellants have either abandoned or are in the process of abandoning the branch houses as a means of

[5] The consent decree does not bar, and one or more of appellants manufacture and sell, a few unrefrigerated shelf items, such as salad and cooking oil, evaporated milk, canned dog food, peanut butter, soap and certain canned meat products.

distributing the non-prohibited grocery items (Tr. 572-75, 806-07; SX 3-5).

Moreover, appellants have found it impossible today to employ their general line meat salesmen, as formerly, for effectively selling even their limited line of non-prohibited groceries along with meat to the retail trade (Tr. 801-02, 1302-05, 3145-46). This is because today's retailer, predominantly chain-owned or affiliated with a wholesaler-sponsored retailing organization (voluntary) or with a wholesaling organization owned by a retailer group (cooperative), no longer purchases groceries from salesmen calling at the retail store door, but concentrates his purchases at the warehouse with which he is integrated (Tr. 618, 1780-83). As a result, 85% of the cooperative wholesalers and 82% of the voluntary wholesalers have dispensed with store-door salesmen (AX 27). Moreover, such wholesalers as well as corporate chains now prohibit store-door solicitation of their affiliated retailers by the salesmen of other wholesalers and food manufacturers, including appellants (Tr. 577-78, 802, 1353-60). Their retail members merely order upon preprinted forms which are then mailed back to the affiliated warehouse (Tr. 1613-14; AX 27).

Not only have changed conditions in the grocery industry removed appellants' former competitive advantages, they have created strong and efficient competition at every level of the industry. Thus, present-day retailing is carried on in large, efficient supermarkets, which in 1958 accounted for approximately 74% of all grocery store sales (Op., App. 54). The more than 7,000 supermarkets which were built between 1955 and 1958 averaged sales of over $1.25 million a year (SX 11).[6] Such large volume, together with self-

[6] This is in contrast with the situation in 1929, and 1920, when retail food stores were typically small, clerk-service operations, averaging only $23,800 annually (Tr. 1044; SX 7F, 12). Retailers

service, mass merchandising and scientifically engineered store layout, have strengthened the modern retail grocer by permitting him to increase efficiency and substantially lower costs (Tr. 1044-46, 1608-13; AX 25; CX 26; SX 11).

Paralleling the growth of the supermarkets, grocery wholesalers have vastly increased the scope and efficiency of their operations, which are now tailored to modern-day mass distribution of groceries. In 1929, independent wholesalers averaged sales of only $511,000 annually and were relatively inefficient (SX 18; Tr. 3141-42). By contrast, in 1958, cooperative wholesalers averaged sales of $13.3 million annually (SX 25). Other types of grocery wholesalers, voluntaries and unaffiliated, have also significantly increased sales volume, and unit operating costs have been reduced (SX 25; Tr. 6798-6800). This increase in volume and efficiency has been attended by the construction (mainly since World War II) of modern wholesaling facilities, which are specially adapted to the low-cost handling and large volume delivery required by today's supermarkets (Tr. 1123-24, 1169, 6798-6802; AX 4).

In addition, retailing is now closely integrated with wholesaling throughout the industry. As the district court found, "the strength of the chains," by which the court meant corporate chains, voluntaries and cooperatives, "has continued to increase" since 1930 (Op., App. 54). Quantitatively, corporate chain stores and voluntary and cooperative member-stores account for over 83% of retail grocery sales (AX 19). Furthermore, such retail outlets obtain sub-

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unaffiliated with any chain, voluntary or cooperative wholesale organization were the largest group in the food store market (SX 22). Even those stores which were affiliated with voluntary or cooperative organizations usually maintained a loose relationship with their wholesaler, purchasing only a small part of their food requirements from this source (Tr. 3095-96; 1930 R. 766; GX 210, p. 7).

stantially all of their requirements from affiliated wholesaling warehouses (Tr. 1142-43, 3187-88, 7143-45, 7447-48). Their integrated wholesalers provide retailers affiliated with voluntaries and cooperatives with not only group buying and warehousing services, but also extensive financial and management assistance (Tr. 1193-96, 6800; AX 28). And the small number of retail grocery stores which remain unaffiliated can obtain similar services from cash-and-carry wholesale outlets (Tr. 1599-1601; AX 28).

The foregoing changes have also had their impact at the level of grocery manufacture. With store-door selling outmoded, even the small grocery manufacturers can as easily serve the trade as appellants since they do not need an extensive sales force working at the retail level (Tr. 1442, 1627-28). Moreover, there are today many strong and efficient companies manufacturing or processing each of the now-prohibited grocery products (AX 105; CX 68; SX 90-93). These have plants and equipment already in existence and brand names with established consumer appeal (Tr. 1503-05, 3350; CX 69). Although appellants' trade names are well known in meats, they have not been successfully transferred to grocery products (Tr. 3112-14, 3533-35, 5842-44, 7988-89; JX C). Finally, government witnesses testified that appellants' entry into grocery manufacturing would in fact be beneficial to competitive conditions (Tr. 6820-21, 7340).

The absence of any prospective competitive advantage over rival grocery manufacturers or wholesalers is also demonstrated by the record of appellants' performance in those limited grocery items not barred by the decree. Appellants' respective shares of the market in the non-prohibited grocery products have suffered an almost consistent decline (AX 71-82; CX 53-60; SX 60, 69-77). The Government, moreover, stipulated that today there is active competition among and between the appellants and all others who

produce and sell these non-prohibited grocery products (JX B, C and D).

b. **The Evidence of Changed Conditions in Meat Packing**

In 1920, it was charged that appellants were attempting to extend an alleged monopoly in meat into groceries. While by 1930 competition in meat packing had been restored among appellants, retailers were still dependent on them for meat supplies, and the danger remained that if the decree were lifted, appellants would condition the sale of meats upon the purchase of their groceries (286 U.S. at 118; 1930 R. 744, 1049). This dependency stemmed largely from appellants' then strategic position as the only meat packers operating on a national scale. Only appellants, with their extensive branch house systems, fleets of route and refrigerated cars, large forces of general line salesmen soliciting at the store-door level and huge plants at the old livestock marketing terminals, were in a position on a national scale to service retailers with meat (1930 R. 441-42, 470; Tr. 3011-15, 3398-99).

In contrast to the situation prevailing throughout the 1920's, the district court in the pending proceeding did not find that purchasers of meat or meat products are today dependent upon any of appellants as a source of supply or that any danger remains that appellants could tie groceries to meat. The Government stipulated that today none of the appellants conditions the sale of its meats upon the purchase of the non-prohibited grocery products (JX B, C and D). The disappearance of any dependency on appellants has been caused by the rise of hundreds of meat packers and processors, attracted by far-reaching changes throughout the industry, who now compete with appellants in the national market, and are available as alternative

sources to retailers everywhere (Tr. 3099-3101, 4284-88, 4590-91).

The former necessity for packer branch-houses in each locality has been obviated "with the increased development of volume-buying direct from packing plants" and the construction of chain-operated meat warehouses (Op., App. 52; Tr. 4873-74). Mechanically refrigerated trucks now enable all packers to make such direct shipments quickly and effectively from coast to coast (Tr. 4590-91, 4924-27). National selling by packers of all sizes via long-distance telephone has supplanted large store-door sales staffs now that "centralized buying of meats has increased, with corporate chains purchasing practically all of their meat under group buying arrangements" (Op., App. 55), and with important cooperative and voluntary groups doing likewise (Tr. 3454-55, 3492-93; AX 108). "The quantity of meats sold under the private brands of chains, wholesalers, and retailers has increased," thus permitting them to buy from packers without established brands (Op., App. 52; Tr. 3104-05). Similarly, "the growth of federal meat grading programs since World War II has tended to widen the markets open to the small competing packers" since federal grades are increasingly displacing nationally-advertised packer brands, thus equalizing the competitive position of packers large and small, and enabling retailers to buy meats from distant packers without the need for local buyer inspection (Op., App. 52; Tr. 3040-42, 3058, 3100-01, 4582-83, 5789, 6903, 6907-08).

Extensive changes in meat slaughtering and processing techniques have allowed smaller competitors to do business with a lower capital investment. In contrast to the large multi-specie, multi-story and multi-function plants required in the 1920's (Tr. 4284-85, 4330-32), today's processing, and even the slaughtering of different species, is carried

on in separate, single-story, highly mechanized facilities which are now operated as successfully by smaller packers and processors as by the larger ones (Tr. 3867-68, 4300-03, 4330-34, 4338-40; AX 39, 40). Finally, decentralization in livestock marketing has enabled packers, regardless of their plant location, to obtain livestock readily and cheaply at neighboring markets in which there is governmental assurance of competitive conditions (Tr. 4590-92, 4641-43; AX 60, 66, 67).

Demonstrative of the increased number and importance of non-defendant sources for meat has been the appellants' steady decline in the meat packing industry since 1930. Appellants' total slaughtering operations, as reflected in their percentages of the total liveweight or dressed weight of U. S. Commercially Slaughtered meat, showed the following significant declines between 1930 and 1958: Armour, from 17.0% to 10.8%, more than one-third of its industry position; Cudahy, from 5.5% to 2.4%, more than one-half of its industry position; and Swift from 18.2% to 14.1%, more than one-fifth of its industry position (AX 54; CX 43; SX 46). Appellants' decline has been even greater in processed meats which is the most profitable part of the meat packing business (Tr. 3820-22; AX 43). "Under competitive pressure, the petitioners have processed a decreasing share of their slaughter, . . . relinquishing a more profitable aspect of the business" to competitors (Op., App. 53).

Appellants' decline in the industry is further demonstrated by the fact that their profits have been steadily "below the average of their smaller competitors" (Op., App. 53). During the ten-year period 1949 to 1958, Armour experienced an average annual loss of $596,000 in its meat operations (AX 33). In this same period, Cudahy's total operations resulted in a net loss of over $900,000 (CX 111).

Finally, Swift's total earnings as a percentage of net worth were almost consistently lower than those of non-defendant packers in the period since 1937, whereas prior thereto they had been almost consistently higher (SX 82, 83).

Appellants' decline in meat packing has been attended by the disappearance of competitive advantages which they formerly possessed with respect to rival packers and processors. Thus, "the advantages flowing from the location of the defendants' large packing plants at the nation's chief rail centers have diminished," with the result that major plants have been closed and appellants forced to withdraw from important markets (Op., App. 51; Tr. 4347-50; CX 4). "With the increased development of volume buying direct from packing plants, the branch houses were gradually reduced in number and efficiency" (Op., App. 52). The remainder handle an ever smaller amount of product, and that often at a loss (Tr. 4034-37; AX 48). Appellants have "drastically reduced their ownership of refrigerated railroad cars," and no appellant "owns a significant share of the available means of transportation today" (Op., App. 52). "The increase in the cold storage facilities of both retailers and wholesalers has made the defendants' provision of extensive refrigerated shipping and storage space unnecessary" (Op., App. 52).

c. The Evidence of Changed Conditions in the Handling of Fresh Milk

Finally, and with specific reference to paragraph Eighth of the decree, which prohibits appellants from handling or selling fresh milk and cream, a significant change in the law through the initiation and increased application of Federal Milk Marketing Orders, promulgated by the Secretary of Agriculture pursuant to the Marketing Agree-

ment Act of 1937, as amended (7 U.S.C., § 608 (c)),[7] has caused an unforeseen hardship to appellants' permitted dairy operations.[8] Since appellants are barred by the decree from selling fresh milk, they are unable to qualify as "handlers" under such Orders (Tr. 6193-94, 6201). Inability to qualify has placed appellants under serious competitive handicaps, since today they are either unable to retain their farmer suppliers in the ever-expanding areas covered by Milk Orders, or are forced to pay such high prices for raw milk that profitable operation of their cheese, butter and milk condensing or evaporating plants are rendered difficult or impossible (Tr. 6189-91, 6200-06, 6257-60). Deprived by paragraph Eighth of the requisite flexibility to adapt to changed conditions, appellants' sales of the specifically permitted dairy products have shown a significant decline, their manufacture of such products has been curtailed, and numerous of their dairy manufacturing plants have been closed (Tr. 6248-49, 6283-90).

THE QUESTIONS ARE SUBSTANTIAL

In denying modification of forty-year old consent decree restraints on otherwise lawful competitive activity, the district court departed from this Court's ruling in the *Swift* case and from basic principles of federal antitrust policy, in the following respects: (1) Modification has been denied although the dangers against which the decree was entered no longer exist and, in determining those dangers

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[7] Seventy-seven such orders were in effect in 1959, blanketing much of the country and directly affecting about 40% of the milk sold by farmers, and these are supplemented by a number of state programs further extending the application of milk price regulations (Tr. 6205; AX 86-89).

[8] The decree specifically permits petitioners to buy and use fresh milk and cream in manufacturing condensed, evaporated or powdered milk, oleomargarine, butter, ice cream, cheese, buttermilk, or in feed.

the complaint has been ignored. (2) Size, even when not attended by the power of anticompetitive abuse, has been treated as synonymous with danger to competition, and has been found to be a sufficient reason for continuing antitrust injunctive restraints. (3) By consenting to the decree, appellants have been held to have bargained away their right to obtain modification. (4) Great uncertainty has been created as to whether and what kind of hardship must be shown in an antitrust decree modification case. (5) The benefit to the public interest which would result from increased competition by appellants in the food industry has been treated as irrelevant. (6) Realistic standards for consent decree modification have not been followed. (7) The court has ignored the possibility of adapting the decree to changed conditions through partial relief.

These errors of the district court give rise to the substantial questions presented on this appeal. They go to the heart of the question of the proper standards for modification of antitrust consent decrees.

I. Antitrust consent decrees prohibiting otherwise proper business endeavor should be modified whenever the defendant has affirmatively established that changed circumstances make them presently unnecessary for protection against the dangers to competition which originally led to their entry. Injunctions under the antitrust laws can find their justification only in those laws. Entered to "prevent and restrain" those actions which offend the statutes, they must be removed when it is affirmatively shown that the original need for them is gone. The policy of the federal antitrust laws requires the removal of restraints on competition, whether privately or judicially imposed.

Where a consent decree has been entered without a trial, the complaint furnishes the proper basis for determining the reasons for the decree's entry. To ignore the complaint in consent decree cases is to leave the reason for the decree to mere conjecture. The allegations of the original complaint are clear in their statement of the reasons for the prohibitions in issue (*supra*, p. 6). The Government itself in the 1930 case reaffirmed that those allegations were the "principal ground" and primary basis for the injunction (Gov't S. Ct. Reply Brief, pp 1-2).[9] Similarly, the Supreme Court on appeal in the *Swift* case was guided entirely by the allegations of the complaint in determining the reasons for this decree. The inquiry below should properly have been directed to whether those same reasons obtain today.

In an unaccountable departure from customary procedure and from the opinion of this Court in the *Swift* case, the district court held that the complaint allegations are irrelevant, and that the previous opinion of this Court did not, despite its plain language, treat the complaint reasons as the controlling reasons. It asserted that these reasons do not really account for the decree provisions, and that it was "fortuitous" that the complaint stated any reasons at all (Op., App. 46). It proceeded instead to embark upon an unprecedented speculative analysis in its search for an "underlying reason." The district court fell into these

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[9] In its reply brief in the Supreme Court in the 1930 case, the Government contended:

> "The sole issue presented to this Court by the Government is whether appellees have shown changes since 1920 which warrant modifying the consent decree to permit the defendants (1) to manufacture and handle (except at retail) unrelated lines and (2) to use their distributive facilities in this connection.
>
> "As bearing upon this issue, it is of fundamental importance to observe that there has been no change in the condition set forth in the Government's bill as the principal

errors by failing to keep to the fore the policy of the antitrust laws. The sole basis for the prohibitions in issue was an antitrust purpose of removing certain dangers to free competition in the grocery industry allegedly existing in 1920. Those dangers were clearly identified. The district court overlooked them through its preoccupation with appellants' corporate size and the supposed compromise reached by the parties when the decree was entered.

2. The district court held that the decree cannot be modified as long as the appellants retain large size as meat packers (Op., App. 49, 57). This test is completely contrary to this Court's holding in the *Swift* case, and to fundamental antitrust principles laid down in other decisions of the Supreme Court.

The district court quoted an excerpt from the *Swift* opinion to attempt to support its thesis (Op., App. 48-49). But the *Swift* opinion clearly adopted as the test, not size, but the question of whether changes had removed the danger of the competitive abuses of power against which the decree was entered. "The inquiry," the Supreme Court said, was "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow" (286 U.S. at 119). The opinion stated plainly what these critical dangers were.

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ground for enjoining the defendants from dealing in unrelated lines. The Government's request for such an injunction rested primarily upon the allegation that the defendants could handle unrelated lines through their nation-wide distributive system with comparatively no additional overhead expense and could employ this advantage 'temporarily to fix prices so low as to gradually eliminate competition,' with consequent danger of monopoly and restraint of trade (R. 17). There has been no material change in the extent or character of defendants' nation-wide distributive system. And appellees admit, indeed assert, that they can today use this system to handle unrelated lines with practically no additional expense' (Gov't S. Ct. Reply Brief, pp. 1-2).

The Court said:

> "Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then had, is theirs with undiminished force today" (*Id.* at 115).

The Court held that the "first reason" was:

> ". . . that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now" (*Ibid.*).

And the "second reason" was:

> ". . . the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated" (*Id.* at 116).

The Court stated that the defendants would still have the "temptation" to resume predatory price cutting because their low overhead costs, resulting from the ability to distribute groceries in the same facilities used to handle their nation-wide meat sales, would still put them in a position to starve out competition.

It was only in light of the continuing applicability of these reasons that the Court referred to the defendants' size. It specifically held that size was not itself the offense. It pointed out, however, that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past" (*Id.* at 116). The continued presence of the decisive distribution cost advantage which had been "utilized in the past"

required the Court to hold that the original competitive dangers were still present.[10] This prevented modification despite the changes asserted by defendants. Thus, the termination of defendants' monopoly in meat and the restoration of competition did not afford adequate grounds for modification since the original dangers were found to be still present:

> "Changes there have been that reduce the likelihood of a monopoly in the business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods" (*Id.* at 117).
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> • • •
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> "When they [defendants] add groceries to meats, they will do so, they assure us, with substantially no increase of the existing overhead. Thus in the race of competition they will be able by their own admission to lay a handicap on rivals overweighted at the start" (*Id.* at 118).

The Court also rejected the contention of the defendants that the growth of the chains since 1920 had removed the dangers to competition created by the distribution advantage. It found instead that the chains and other retailers depended upon the defendants for their meats. This would accentuate the competitive danger in the distribution advantage against which the decree had been entered. The Court observed that:

> "If the grocery business is added to the meat business, there may be many instances of unfair pressure upon

[10] Although the retailing prohibitions of the decree were not before the court on appeal, the court stated that this rationale permeated the prohibition against retailing as well as that against manufacturing and wholesaling. "The one prohibition equally with the other was directed against abuse of power by the individual units after the monopoly was over; . . ." (286 U.S. at 117).

retailers and others with the design of forcing them to buy from the defendants and not from rival grocers" (*Id.* at 118).

Under these conditions, the old dangers of abuse, to the Court, were not "attenuated to a shadow." The continuance of these dangers, and not defendants' size, was the reason for denying modification.

The district court's emphasis on size in the present case was not only contrary to the standards established by the *Swift* opinion, but to basic antitrust principles consistently adhered to by this Court over the years. The Court has repeatedly rejected contentions that size alone is a danger against which Sherman Act policy is aimed. This line of decisions is unbroken from *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920), through *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927), the *Swift* case itself, 286 U.S. at 116 (1932), and *United States v. Columbia Steel Co.*, 334 U.S. 495, 526 (1948); only recently, in *Tampa Electric Co. v. Nashville Coal Co.*, —— U.S. ——, 81 S. Ct. 623 (1961), this Court rejected the use of large dollar-volume figures as the measure of danger to competition.

The district court's errors led it to overlook the significance of the evidence of massive economic changes in the food industry since 1930, and the disappearance of the dangers of the old abuses. Unlike this Court in the *Swift* case, it held against the appellants even though it found the distribution cost advantage gone; it identified no continued dangers or temptations of predatory price cutting or of unfair pressure on retailers; and it reached no conclusion that a "war of extermination" was threatened or even possible.

Instead the district court treated appellants' size as synonymous with the danger of competitive abuse, and sub-

stituted their size for the competitive dangers which had prompted the decree. The inferences drawn by the court adverse to appellants stemmed entirely from the erroneous presumption that size was the evil. Mere statistical data on appellants' size in the meat industry, as measured by their assets, total sales and livestock slaughter was treated as "dominance in meat packing" (Op., App. 50-53), despite the extensive and detailed evidence demonstrating that appellants' size does not afford them any power to overwhelm competitors today, and more particularly, does not give them any power to tie groceries to meats, and despite the fact that the court made no finding that any appellant has such power. The error was compounded by aggregating statistical measurements of appellants as if they were still in combination with each other (Op., App. 51 and 53), in the face of the court's own finding that the combination had ended long ago (Op., App. 56). For example, through aggregation, the court seemed to regard Cudahy's 2.4% of total U.S. slaughter as amounting to "dominance in meat packing" (*supra*, p. 18; Op., App. 50-53).

In addition, certain ambiguously described competitive advantages in wholesaling which the court thought defendants might enjoy (Op., App. 55), were simply assumed as inherent in size and diversification, despite the court's own findings based on undisputed evidence that groceries and meats are generally bought and sold separately today, that appellants' permitted grocery items and meats are completely separated in appellants' distribution systems, and that, in contrast with 1920 and 1930, appellants' meat distribution systems are totally unsuitable for the handling of groceries in competition with modern wholesaler organizations (Op., App. 55; *supra*, p. 12). Similarly, the court indicated that an undefined advantage would accrue to appellants in retailing because of their aggregate size as meat packers (Op., App. 54), despite the court's findings

that appellants are in active competition with each other, that they have lost many of their former advantages in meat packing, that extensive changes have occurred in meat distribution since World War II which have worked to "widen the markets open to the small competing packers" (Op., App. 52), and despite the absence of any finding that retailers are dependent upon appellants for meat.

3. The district court erred by concluding that appellants are not entitled to relief because they bargained away their right to modification so long as they retain their size as meat packers. While purporting to disclaim a holding that appellants are barred from relief by contract (Op., App. 37), the court repeatedly emphasized the fact of compromise and settlement (Op., App. 11-12, 41, 42, 44, 45, 49, 57). "[T]he decree was the product, in principal part, of negotiation between the defendants and the government" (Op., App. 11); it "bears traces of compromise" (Op., App. 42); and the "evidence of compromise in the decree suggests their [defendants'] power to bargain" (Op., App. 44). From this the court argued: "They gained significant advantages through their consent. They . . . avoided the risk of more drastic relief that might have required division of their gigantic operations" (Op., App. 44). This led the district court to deny relief because: "They chose to retain size as meat packers rather than to risk further dismemberment, at the price of abandoning the opportunity to extend into other fields" (Op., App. 57).

Appellants challenge the use of the supposed bargain as a guide to modification. It led the court to err by adopting different, and more stringent, tests for modification of this consent decree than would be applied to litigated decrees. According to the court below, the difference between litigated and consent decrees has a "profound effect

. . . upon the task of the judge in ruling upon a request for modification" (Op., App. 41); for a consent decree, "the way of escape is narrow" (Op., App. 43).

This treatment of consent decree modification runs counter to the express statements by this Court in the *Swift* opinion that: "The result is all one whether the decree has been entered after litigation or by consent . . . [I]n truth what was then adjudged was not a contract as to any one" (286 U.S. at 114-15). The opinion below is equally at odds with the recent holding of this Court in *System Fed'n 91, Railway Employes' Dep't v. Wright*, 364 U.S. 642 (1961). Quoting with approval the above language from *Swift*, this Court emphasized that:

> "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction.
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> • • •
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> "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable. The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the Court was not acting to enforce a promise but to enforce a statute" (364 U.S. at 651, 652-53).

In holding that the meat packer consent decree cannot be modified because appellants still retain the corporate size which they allegedly kept in exchange for relinquishing other freedoms, the district court followed a bargain theory which this Court has just held to be erroneous.

4. The appeal raises the question of the proper relation of a showing of hardship to antitrust consent decree modification. The appellants at the trial produced proof of financial and competitive hardships, including the stultification of their research on new food products and processes, to which they are subjected by the continuation of the decree. Appellants contended that absent any present need for the decree, continuance of its sweeping prohibitions against competitive activity by them in major segments of the food industry works a hardship on them which should properly form additional grounds for modification of this decree. At the same time, however, they maintained that a showing of hardship is not a prerequisite to modification where the need for the restraints is gone. The Government, on the other hand, contended that the appellants in a consent decree modification case must always show grievous, unforeseen hardship.

While the district court rejected the Government's hardship argument as too extreme, it also apparently disagreed with the appellants' interpretation. Without support from this Court's previous *Swift* opinion, the district court called lack of need and hardship "correlative elements of a single standard. . . ." (Op., App. 40).

The district court held that appellants had not shown enough hardship to warrant modification (Op., App. 55-56), but it is impossible to know from the opinion what effect, if any, this holding had upon the decision against modification, since the court had made conflicting statements as to the necessity of hardship.[11]

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[11] The court stated once that defendants must show that the decree can no longer be justified because of changed conditions, "*and* that they are suffering injury, without counterbalancing advantage to the public interest, sufficient to move a court of equity to act" (Op., App. 43; emphasis added). Later, it contradicted itself by saying that the "defendants' mistake in

Such an important legal question should not continue to be enshrouded in this much doubt. Appellants urge that the Supreme Court did not intend in the *Swift* opinion to require a showing of hardship as an absolute prerequisite to modification of an antitrust consent decree where the original need for it has vanished. Such a requirement for antitrust consent decree modification would be unwarranted both by the principles of antitrust policy, whose sole purpose is to maintain competition, and by the fundamentals of equity, whose function is remedial, and not punitive.

5. This appeal raises substantial questions concerning the future of competition in major branches of the food industry. The appellants seek freedom to add their competition to the phases of the food industry now prohibited to them. But the district court treated the question of the public value of increased competition by appellants as of no significance. The court said that the elimination of the appellants from the general food industry "can hardly be said to harm the public interest" (Op., App. 56). But it added on the other hand, "to whatever extent the defendants would be a significant competitive power in the field, the fears which gave birth to the decree are confirmed" (*Ibid.*). These assertions, that new competition should be treated as either unimportant or inherently dangerous, manifest little faith in the philosophy that "the policy unequivocally laid down by the [Sherman] Act is competition" *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

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giving consent will remain beyond recall until the decree operates to oppress him in ways uncontemplated at its issuance, *or* until circumstances have so changed that the foundations of the decree, whether adequate or not, are completely undermined" (Op., App. 43; emphasis added).

6. The landmark opinion in the *Swift* case was the last occasion on which this Court has broadly analyzed the legal and economic standards governing modification of antitrust consent decrees. The great majority of the decrees now in force have been entered in the years since then, and the consent decree has become a prime instrument of antitrust enforcement. Far more civil antitrust cases brought by the United States are terminated by entry of such decrees than in any other way. Since the first antitrust consent decree in 1906, almost 500 have been entered, governing numerous different industries and types of competitive activity (2 Trade Reg. Rep. ¶ 8421). The number is steadily increasing. It is obviously of great importance that there be clear standards governing modification of this large number of continuing antitrust injunctions. It is of even greater significance to the free competitive policy of the antitrust laws that the standards governing decree modification be such as to permit removal of prohibitions which have plainly outlived their antitrust usefulness. It is especially important that prohibitions of the kind found in the present decree against engaging in otherwise entirely lawful fields of activity be subject to removal. It is not contended that such restrictions should be lifted without a convincing showing. But when such a showing is made, the restraints on competition should be removed. Otherwise, the continually growing accumulation of such outmoded decrees will defeat the very policy of economic freedom which brought them into being.

7. While recognizing its power to modify as an abstract equitable proposition, the district court drained the power of substance by erecting enormous obstacles to modification which are likely to add further support to an already growing view that modification of antitrust consent decrees

in contested cases has ceased to be a realistic possibility.[12] This is particularly true here since the court even ignored the appropriateness of any form of partial relief. Its sweeping and doctrinaire holding as to the purpose of this decree led it to shut its eyes to all possibilities for adaptation of the decree to modern needs. For example, if the court objected to retailing by the appellants because it feared that they might acquire existing retail stores or chains (Op., App. 54), despite the protection against anti-competitive acquisitions afforded by Section 7 of the Clayton Act, it had but to grant relief qualified by a provision restricting acquisitions. If the court was concerned that the appellants would have undue advantages in competing with grocery wholesalers by selling a full line of meats and groceries (Op., App. 55), despite its findings contrary to any such advantages, it should at least have considered allowing manufacturing by the appellants, with some provision for marketing grocery products through the wholesale outlets of others.

The court seemed to think that even the slightest modification was legally precluded. It thereby completely ignored the flexible powers of equity, and the almost infinite variety of measures available to a chancellor in fashioning appropriate relief. These powers, it is urged, should have been exercised to lift unnecessary shackles on lawful enterprise in order to carry out the policy of the antitrust laws. Instead, the opinion below has assigned a virtually immutable status to this decree, which is inconsistent with the requirements of antitrust policy and which conflicts with the decree modification principles previously

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[12] Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 Mich. L. Rev. 1051, 1063-64 (1958); Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 Yale L.J. 1391, 1393-97 (1959).

expounded by this Court. The opinion gives rise to the inquiry: Short of dissolution, what possible showing could appellants make which would entitle them to relief?

CONCLUSION

The questions presented by this appeal are substantial and they are of public importance. The case itself is of great significance in the field of antitrust law. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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